IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

Crl.Rev.Pet.No. 793 of 1998-B

CRA.407/1994 of III ADDL.SESSIONS COURT, ERNAKULAM
SC.83/1993 of III ADDL.ASSISTANT SESSIONS COURT, ERNAKULAM

.....

REVN. PETITIONERAPPELLANT/ACCUSED NO.2.

SANKAR, S/O. SUBRAMONIYA IYER,
VRINDAVAN, THOTTAKKATTUKARA, ALUVA.

BY ADV. SRI.B.RAMAN PILLAI
SRI.S.VIJAYAKUMAR

RESPONDENTS:

STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR MR. AMJAD ALI

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21/03/2007, ALONG WITH CRRP NO. 807 OF 1998 THE COURT ON 25-5-2007 PASSED THE FOLLOWING:

ORDER ON CRL.M.P.NO. 4055 OF 1998 IN CRL.R.P.NO. 793 OF 1998

DISMISSED.

25-5-2007 SD/-K.R.UDAYABHANU, JUDGE

TRUE COPY

P.S.TO JUDGE

K.R. UDAYABHANU, J.

CRL.R.P.NOS.793 & 807 OF 1998

DATED THIS THE 25th DAY OF MAY 2007

ORDER

The revision petitioner in Crl.R.P.No.807/1998 is the first accused and the revision petitioner in Crl.R.P.No.793/1998 is the 2nd accused in S.C.No.83/1993 in the file of the III Additional Assistant Sessions Court, Ernakulam. Both the accused stands convicted for the offence under Section 307 read with Section 34 I.P.C.and sentenced, as modified by the appellate court, as follows:

2. The first accused is to undergo rigorous imprisonment for two years and to pay a fine of Rs.10,000/- and in default to undergo rigorous imprisonment for one year. The 2nd accused is sentenced to undergo rigorous imprisonment for six months and also to pay a fine of Rs.3,000/- and in default to undergo rigorous imprisonment for six months. It is also directed that out of the fine amount, if realised, half of the same shall be paid equally to Pws.2 and 3. It is the contention of the revision

petitioners that the courts below have grossly erred in the appreciation of evidence as well as in applying the appropriate propositions of law in the matter.

3. It is the prosecution case that on 10-2-1992 at about 7.50 p.m. the first accused confronted Cws.1 to 3/PWs.1 to 3 while they were walking through the public road and pointed a loaded gun on the neck of CW1 and when CW1 caught hold of the barrel of the gun, and pushed it down, A1 fired the gun and the pellets hit the legs of Cws.2 and 3 who sustained serious injuries. It is also alleged that the accused reached the spot in the motor cycle driven by A2 and that when CW1 ran away to escape, A2 shouted that CW1 has not been hit and that he should not be spared.

4. The evidence adduced in the matter consisted of the testimony of Exts.P1 to P40 and Mos. 1 to 19. The defence got marked Exts.D1 to D12 which are the portions of Section 161 Cr.P.C.statement of the witnesses with which they were confronted in the cross examination; as well as Exts.D13 and D14. It is the prosecution version that A1 who was having an affair with PW8 Valsa had a scuffle earlier, i.e. on 26-12-1991

with CW1 as he suspected that CW1, who is the neighbour of PW8, telephoned her falsely identifying himself as A1. The occurrence witness, PW10, turned hostile. The direct evidence regarding the incident is the depositions of Pws.1 & 2 and that of PW7. Pws.4 and 5 have witnessed the later portion of the incident as their attention was drawn to the spot on hearing the dsound of the gunshot. PW2 sustained serious injuries, i.e. communitted fracture of tibia and fabula of the left leg with muscles and bone exposed and a number of pellets inside. He underwent surgical procedure under general anesthesia, blood transfusion, skin grafting and application of external fixtures and also had prolonged hospitalization. PW3 also sustained gun shot injury on the right foot and pellets pierced in the area near to 1st matatarsal bone . The pellets were was removed under general anesthesia.

5. It is the direct evidence of Pws.1 to 3 of whom Pws.2 and 3 are the injured that constitute core of the prosecution evidence. Pws.1 to 3 have testified that on the particular day just before the time of the incident, A1 and A2 were found coming in the opposite direction in an ambassador car and when

the car reached near them, the same was slowed down and then drove away. Tereafter, A1 and A2 came near them in a motor cycle that was driven by A2 and A1 was the pillion rider. A1 was holding a gun. The bike was stopped and A1 came near them , abused them and shouted that he has come there to kill them and pointed the gun at the neck of PW1. It is the version of PW1 that he took it as a joke and told A1 to go ahead and kill. But at the time he felt from the facial expression of A1 that he is about to accomplish the above task and instantly he caught hold of the barrel of the gun and pulled it down towards the left hand side and instantly the gun went off. The shot hit Pws.2 and 3 and they cried aloud. A1 then took a few steps back, took the pellets from his pocket, loaded the gun and started re-loading. PW1 ran away towards the Junction to escape. Then he heard A2 shouting that "he has not been hit, he should not be spared. A1 chased him to a certain extent but he managed to hide himself among the people who are waiting at the bus stop. As already mentioned above, it is the evidence of Pws.2 and 3 along with the version of PW1 that constitute the direct evidence with respect to the entire incident. PW4, is a

friend of Pws.1 to 3 whom they met at the Milma Booth just earlier had assured that he shall join them. PW5 is the brother of PW1. Both of them saw the later part of the incident. PW7, another witness has also witnessed the incident and testified accordingly. It was Pws.4,5 and 6, who removed PW2 to the hospital in an autorikshaw. The accused were absconding. On 26-2-1992 they were arrested and on the basis of Section 27 statement of A1 the gun as well as MO.16 series catridges seized from the upstairs of an uninhabited double storied building vide Ext.P28 mahazar. The witnesses examined included the Doctor who treated Pws.2 and 3 and PW.27, the Ballistic experts of the F.S.L. and Exts.P2 report of PW27. The evidence of Pw.27 is to the effect that the spent catridge case was fired from the weapon seized . PW10 is the dealer of Fire Arms at Ernakulam. He has produced and proved the records with respect to the purchase of MO.1gun on 7-12-1991 by A1. The same is "A 12 bore SBBL Fire Arm 123 cm long" with a barrel length of 82 cm. The contention is that the length of the gun mentioned in Ext.P21 mahazar is 124 cm. The Ballistic Expert as per Ext.P22 report has mentioned that the length of the gun was 123 cm.

The contention was rightly discarded by the courts below since the evidence of PW27 as to the use of the particular gun with the seized pellet case and also in view of the identification of the same by the material witnesses concluding that the difference of 1 cm. in the length of the fire arm can only be a mistake that occurred when the same was measured at the time when the mahazar was prepared. The description of weapon ," as country gun" in the mahazar, Ext.P29, has been explained by PW3, the investigating officer.

6. The revision petitioners have also highlighted the fact that F.I.S. and the F.I.R. reached the court only on 12-2-1992 at 11.10 a.m. whereas the F.I.S. was recorded and the case registered on 10-2-1992 at 9.10 p.m. It was also brought out that the court premises is not situated far away from the police station. The above lapse has not been explained, it is contended. Of course, the lapse is material, but I find that so far as A1 is concerned the above delay is hardly sufficient to doubt the veracity of the prosecution version. I find that the direct evidence of Pws.1 to 3 and the version of Pws.4 and 5 as well as PW7 stands not discredited. The version of PW.3, the

investigating Officer as to the recovery of gun and the pellets also appears credible . In the circumstances, I find that the conviction of A1 on the basis of the evidence adduced in the matter is only to be upheld.

7. So far as the involvement of the 2nd accused is concerned, the same is confined to the fact that he was found along with the 1st accused and that it was he drove the bike in which A1 came to the spot carrying the gun and also that he shouted that PW1 has not been hit and that he should not be spared. No overt act except the above utterance has been attributed against A2. In the circumstances, the delay of F.I.R. reaching the court assumes significance. The contention that the words allegedly uttered by A2 was subsequently incorporated render the prosecution case against A2 suspicious to a certain extent. The benefit of doubt is the privilege of the accused. There is no evidence that A2 shared the intention with A1. In the circumstances, I find that A2 is entitled to the benefit of doubt. He stands acquitted.

8. Counsel for the revision petitioners have pleaded for leniency stressing that the incident has taken place more than 15

years ago. It is not disputed that A1 married PW8 and that at present they with the children are leading a peaceful life. In the circumstances and in view of the fact that, for more than 1 ½ decades the accused has been facing the proceedings, I find that the sentence is liable to be modified. It is seen that A1 was undergone pre-trial detention for a considerable period. Hence, the sentence imposed on A1 is modified to imprisonment already undergone and to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for eight months. Out of the fine amount, if realised, a sum of Rs.80,000/- shall be paid to PW2 and Rs.20,000/- to PW3.

In the result, Crl.R.P.No.807/1998 is allowed in part and Crl.R.P.No.793/1998 is allowed and the 2nd accused is acquitted. The first accused is granted four months time from today onwards to remit the fine amount.

K.R.UDAYABHANU, JUDGE

ks.

K.R.UDAYABHANU, J

==========

CRL.R.P.NO.793 & 807
OF 1998

ORDER

==========

25-05-2007

==========